

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

| | | |
|------------------------------|---|-------------------------------|
| UNITED STATES OF AMERICA and |) | |
| THE STATE OF WISCONSIN, |) | Case Action No. 1:10-CV-00910 |
| |) | Hon. William C. Griesbach |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| NCR CORPORATION, et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |

**CERTAIN DEFENDANTS’¹ OPPOSITION TO THE UNITED STATES’ CIVIL L. R. 7(h)
EXPEDITED NON-DISPOSITIVE MOTION *IN LIMINE*
TO EXCLUDE OPINIONS AND TESTIMONY OF
DEFENDANTS’ PROPOSED REMEDY CHALLENGE EXPERTS**

The United States’ Motion (Dkt. 519) should be denied because Mr. Fuglevand’s report includes opinions on the dredging by the U.S. Army Corps of Engineers relevant to issues clearly part of the trial, namely: (1) divisibility; and, (2) the equities of the case as required by CERCLA section 106(a). Divisibility unquestionably is part of the December 3, 2012 trial (Dkt. 481-2). As to the equities, CERCLA section 106(a) requires the United States to prove three things to obtain an injunction, including that the equities of the case require the particular injunction being sought. The CERCLA section 106(a) requirements for an injunction are a key subject in the Motion *In Limine* to Establish the Elements of Plaintiff United States’ Prima Facie Case on its Fifth Claim For Relief filed by the Certain Defendants on September 26, 2012 (Dkt. 520). In addition, the equities of the case partly are the subject of the Plaintiffs’ motion to strike

¹ “Certain Defendants” are CBC Coating, Inc., P.H. Glatfelter Company, Menasha Corporation, Neenah Menasha Sewerage Commission, U.S. Paper Mills Corp. and WTM I Company. Counsel for Certain Defendants are listed in the signature page of the Opposition.

the defendants' equitable defenses (Dkt. 430, 430-1, 431, 443, 444 and 456). Plaintiffs' motion to strike is briefed fully.

Certain Defendants agree that a *portion* of Mr. Fuglevand's report addresses the failure by the Environmental Protection Agency and the Wisconsin Department of Natural Resources to follow the National Contingency Plan ("NCP") and the requirements of CERCLA section 121(a) and (b). Thus, a *portion* of Mr. Fuglevand's report is covered by the Court's August 30, 2012 decision (Dkt. 498). CERCLA section 121(a) requires that: "The President shall select appropriate remedial actions . . . which provide for cost-effective response. In evaluating the cost-effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required." 42 U.S.C. § 9621(a). Section 121(b) of CERCLA similarly requires that the "President shall select a remedial that is protective of human health and the environment, that is cost effective . . ." 42 U.S.C. § 9621(b). The opinions of Mr. Fuglevand on this topic, whether the cost-effectiveness analysis of the remedy selection process complied with the NCP, are in the same vein as those of Jeffery Zelikson, whose report was the subject of NCR's motion for reconsideration (Dkt. 501-1) that was granted on September 25, 2012. Dkt. 522. For the reasons discussed in NCR's motion for reconsideration (Dkt. 500), Mr. Fuglevand's opinions should be allowed.

For all the reasons discussed above, the Motion should be denied.

Dated: September 27, 2012

s/ Philip C. Hunsucker
Philip C. Hunsucker
David A. Rabbino
Hunsucker Goodstein & Nelson PC
3717 Mt. Diablo Blvd., Suite 200
Lafayette, CA 94549
Telephone: (925) 284-0840
Fax: (925) 284-0870
phunsucker@hgnlaw.com
drabbino@hgnlaw.com

Anne E. Lynch
Hunsucker Goodstein & Nelson PC
5335 Wisconsin Avenue NW, Suite 360
Washington, DC 20015
Telephone: (202) 895-5380
Fax: (202) 895-5390
alynch@hgnlaw.com

Counsel for Menasha Corporation

s/ Susan E. Lovern
Susan E. Lovern (#1025632)
Michael P. Carlton (#1016037)
Thomas Armstrong (#1016529)
Kelly J. Noyes (#1064809)
von Briesen & Roper, s.c.
411 East Wisconsin Avenue, Suite 700
Milwaukee, WI 53202
Telephone: (414) 276-1122
Fax: (414) 276-6281
slovern@vonbriesen.com
mcarlton@vonbriesen.com
tarmstro@vonbriesen.com
knoyes@vonbriesen.com

Attorneys for Defendant CBC Coating, Inc.

Respectfully submitted,

s/ William J. Mulligan
William J. Mulligan (WI Bar No. 1008465)
Kevin J. Lyons (WI Bar No. 1013826)
Elizabeth K. Miles (WI Bar No. 1064284)
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
Telephone: (414) 276-0200
Fax: (414) 276-9369
wmulligan@dkattorneys.com
klyons@dkattorneys.com
emiles@dkattorneys.com

**Attorneys for Defendant
Neenah-Menasha Sewerage Commission**

s/ Scott W. Hansen
Scott W. Hansen
WI State Bar ID No. 1017206
shansen@reinhardtlaw.com
Steven P. Bogart
WI State Bar ID No. 1005758
sbogart@reinhardtlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Thomas R. Gottshall
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
Columbia, SC 29201
Telephone: 803-779-3080
Facsimile: 803-765-1243
tgottshall@hsblawfirm.com

**Attorneys for Defendant U.S. Paper Mills
Corp.**

s/ David G. Mandelbaum

David G. Mandelbaum
Francis A. Citera
Marc E. Davies
Caleb J. Holmes
Adam B. Silverman
GREENBERG TRAURIG, LLP
Two Commerce Square, Suite 2700
2001 Market Street
Philadelphia, PA 19103
215.988.7800

mandelbaumd@gtlaw.com

Counsel for Defendant P.H. Glatfelter Co.

s/ Nancy K. Peterson

Nancy K. Peterson (Wis. Bar No. 1000197)
Peter C. Karegeannes (Wis. Bar No. 1015025)
Arthur A. Vogel, Jr. (Wis. Bar No. 1010425)
William H. Harbeck (Wis. Bar No. 1007004)
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: 414-277-5000
E-mail: nancy.peterson@quarles.com

Counsel for Defendant WTM I Company

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the following document(s):

**CERTAIN DEFENDANTS'² OPPOSITION TO THE UNITED STATES' CIVIL L. R. 7(h)
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with the Clerk of the Court using the Electronic Court Filing System, which sent notification of such filing to the following:

| | | |
|--|--|---|
| Mary Rose Alexander Mary.rose.alexander@lw.com <i>Georgia-Pacific Consumer Products LP</i> | Thomas Armstrong tarmstro@vonbriesen.com <i>CBC Coating Inc.</i> | Paul Bargren pbargren@foley.com <i>Kimberly-Clark Corp.</i> |
| Linda E. Benfield lbenfield@foley.com <i>Kimberly-Clark Corp.</i> | Dennis R. Birke db@dewitttoss.com <i>Appleton Papers Inc.</i> | Steven P. Bogart sbogart@reinhardtllaw.com <i>US Paper Mills Corp.</i> |
| Michael P. Carlton mcarlton@vonbriesen.com <i>CBC Coating Inc.</i> | Sean K. Carman sean.carman@usdoj.gov <i>United States of America</i> | Evan R. Chesler echesler@cravath.com <i>NCR Corporation</i> |
| Francis A. Citera citeraf@gtlaw.com <i>PH Glatfelter Co.</i> | Marc E. Davies daviesm@gtlaw.com <i>PH Glatfelter Co.</i> | David R. Erickson derickson@shb.com <i>Appleton Papers Inc.</i> |
| S. Todd Farris stf@ffsj.com <i>City of Green Bay</i> | Patrick J. Ferguson patrick.ferguson@law.com <i>Georgia-Pacific Consumer Products LP</i> | Charles Fried fried@law.harvard.edu <i>Appleton Papers Inc.</i> |
| Sandra C. Goldstein sgoldstein@cravath.com <i>NCR Corporation</i> | Thomas R. Gottshall lgantt@hsblawfirm.com <i>US Paper Mills Corp.</i> | Eric W. Ha eha@sidley.com <i>NCR Corporation</i> |
| Gregory J. Haanstad greg.haanstad@usdoj.gov <i>United States of America</i> | Scott Hansen shansen@reinhardtllaw.com <i>US Paper Mills Corp.</i> | William H. Harbeck william.harbeck@quarles.com <i>WTM I Company</i> |

² "Certain Defendants" are CBC Coating, Inc., P.H. Glatfelter Company, Menasha Corporation, Neenah Menasha Sewerage Commission, U.S. Paper Mills Corp. and WTM I Company. Counsel for Certain Defendants are listed in the signature page of the Opposition.

| | | |
|---|---|--|
| Maya S. Abela maya.abela@usdoj.gov <i>United States of America</i> | Cynthia R. Hirsch hirschcr@doj.state.wi.us <i>State of Wisconsin</i> | Margaret I. Hoefler mhoefer@staffordlaw.com <i>City of Appleton</i> |
| Caleb J. Holmes holmesc@gtlaw.com <i>PH Glatfelter Co.</i> | Philip C. Hunsucker phunsucker@hgnlaw.com <i>Menasha Corporation</i> | Peter C. Karegeannes peter.karegeannes@quarles.com <i>WTM I Company</i> |
| Paul G. Kent pkent@staffordlaw.com <i>City of Appleton</i> | Susan M. Knepel susan.knepel@usdoj.gov <i>United States of America</i> | Gregory A. Krauss gkrauss@krausspllc.com <i>Appleton Papers Inc.</i> |
| Linda R. Larsen llarson@martenlaw.com <i>NCR Corporation</i> | Vanessa A. Lavelly vlavelly@cravath.com <i>NCR Corporation</i> | Joshua M. Levin Joshua.levin@usdoj.gov <i>United States of America</i> |
| Susan E. Lovern slovern@vonbriesen.com <i>CBC Coating Inc.</i> | Anne E. Lynch alynch@hgnlaw.com <i>Menasha Corporation</i> | Kevin J. Lyons klyons@dkattorneys.com <i>Neenah-Menasha Sewerage Commission</i> |
| Karl S. Lytz Karl.lytz@lw.com <i>Georgia-Pacific Consumer Products LP</i> | Meline G. MacCurdy mmaccurdy@martenlaw.com <i>NCR Corporation</i> | Sumona N. Majumdar Sumona.majumdar@usdoj.gov <i>United States of America</i> |
| David G. Mandelbaum mandelbaumd@gtlaw.com <i>PH Glatfelter</i> | Bradley M. Marten bmarten@martenlaw.com <i>NCR Corporation</i> | Tara M. Mathison tmathison@dkattorneys.com <i>Neenah-Menasha Sewerage Commission</i> |
| Allison E. McAdam macadam@hgnlaw.com <i>Menasha Corporation</i> | Darin P. McAtee dmcatee@cravath.com <i>NCR Corporation</i> | Stephen F. McKinney smckinney@hsblawfirm.com <i>US Paper Mills Corp.</i> |
| Heidi D. Melzer hmelzer@melzerlaw.com <i>Appleton Papers Inc.</i> | Elizabeth K. Miles emiles@dkattorneys.com <i>Neenah-Menasha Sewerage Commission</i> | William J. Mulligan wmulligan@dkattorneys.com <i>Neenah-Menasha Sewerage Commission</i> |
| Daniel C. Murray murray@jbltd.com <i>NewPage Wisconsin System Inc.</i> | Omid H. Nasab onasab@cravath.com <i>NCR Corporation</i> | Kelly J. Noyes knoyes@vonbriesen.com <i>CBC Coating Inc.</i> |
| Matthew R. Oakes Matthew.oakes@usdoj.gov <i>United States of America</i> | Nancy K. Peterson nancy.peterson@quarles.com <i>WTM I Company</i> | Ian AJ Pitz iapitz@michaelbest.com <i>Brown County</i> |
| David A. Rabbino drabbino@hgnlaw.com <i>Menasha Corporation</i> | Ronald R. Ragatz rrr@dewittross.com <i>Appleton Papers Inc.</i> | Kathleen L. Roach kroach@sidley.com <i>NCR Corporation</i> |

| | | |
|---|--|---|
| Megan A. Senatori ms@dewittross.com <i>Appleton Papers Inc.</i> | Marc A. Shapp mshapp@hgnlaw.com <i>Menasha Corporation</i> | Adam B. Silverman silvermana@gtlaw.com <i>PF Glatfelter Co.</i> |
| M. Andrew Skwierawski mas@ffsj.com <i>City of Green Bay</i> | Sarah A. Slack sslack@foley.com <i>Kimberly-Clark Corporation</i> | Margaret R. Sobota msobota@sidley.com <i>NCR Corporation</i> |
| Jeffrey A. Spector jeffrey.spector@usdoj.gov <i>United States of America</i> | Randall M. Stone randall.stone@usdoj.gov <i>United States of America</i> | Arthur A. Vogel, Jr. arthur.vogel@quarles.com <i>WTM I Company</i> |
| Anthony S. Wachewicz, III tonywa@ci.green-bay.wi.us <i>City of Green Bay</i> | James P. Walsh jim.walsh@appleton.org <i>City of Appleton</i> | Ted A. Warpinski taw@ffsj.com <i>City of Green Bay</i> |
| Ted Waskowski twaskowski@staffordlaw.com <i>City of Appleton</i> | Evan B. Westerfield evanwesterfield@sidley.com <i>NCR Corporation</i> | Richard C. Yde ryde@staffordlaw.com <i>City of Appleton</i> |
| Iva Ziza Iva.Ziza@usdoj.gov <i>United States of America</i> | Kristin M. Furrie kristin.furrie@usdoj.gov <i>United States of America</i> | Alexandra R. Givens areevegivens@cravath.com <i>NCR Corporation</i> |

Dated: September 27, 2012

HUNSUCKER GOODSTEIN PC

By /s/ Philip C. Hunsucker
Attorneys for Defendant
Menasha Corporation
HUNSUCKER GOODSTEIN PC
3717 Mt. Diablo Blvd. Suite 200
Lafayette, CA 94549
Ph: (925) 284-0840
Fax: (925) 284-0870
Email: phunsucker@hgnlaw.com